FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 29 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 458.

GEORGE SYLVESTER VIERECK, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

On Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF.

O. R. McGUIRE,
Attorney for Petitioner,
Southern Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Preliminary statement	1
I. There is no constitutional power in the Congress for the delegation in a criminal statute of authority to an administrative officer to fix a standard, the violation of which shall constitute a crime. The standard must be fixed in the statute itself	5
II. The Secretary of State did not follow the purported requirements of Subsection 3(c) and fix in either Paragraph 11 of the Supplemental Registration Forms or in Paragraph 12 of the Regulations the activities of an agent as agent for a foreign principal which should be reported concerning details required under this Act	7
III. The penal Section 5 of the 1938 Act does not make a crime of any failure, whether wilful or otherwise, to comply with the Regulations and petitioner may not be convicted for an alleged wilful failure to report his activities on his own behalf and not for any foreign principal in answer to Paragraph 11 of the supplemental registration forms	10
IV. The proof does not sustain the indictment	14
1. Prejudicial, incompetent and immaterial evidence offered by the prosecution and admitted by the court	14
2. Statements of prosecuting attorney which did not explain any proof of the charges	17
3. Compensation received by petitioner	21
4. Registration statements in evidence	22
Conclusion	22

AUTHORITIES.

CASES:

	Page
Caha v. United States, 152 U. S. 211	5, 10, 11
Church of the Holy Trinity v. United States, 143 U. S. 226	12
Fasulo v. United States, 272 U. S. 620	14
Harrison v. Vose, 9 How. 372	14
Lanzetta v. New Jersey, 306 U. S. 451	5
Viereck v. United States, 130 Fed. (2nd) 945	4
United States v. Bathgate, 220 U. S. 220	5
United States v. Butter, 195 Fed. 657	11
United States v. Chase, 135 U. S. 255	5
United States v. Dodson, 268 Fed. 397	11
United States v. Eaton, 144 U. S. 677	5, 10, 11
United States v. George, 228 U. S. 14	5, 10, 14
United States v. Grimaud, 220 U. S. 506	10
United States v. L. & N. Railroad, 166 Fed. 942	11
United States v. Sandefuhr, 143 Fed. 49	11
United States v. Standard Brewery, 251 U. S. 210	10
United States v. Wiltberger, 5 Wheat. 76	14

MISCELLANEOUS:

	Page
4 Blackstone, 5	11
Origin of Republican Form of Government in the United States, Straus	20
Totalitarian State against Man, Couden-Hove-Kalergi (Trans. Fadyean)	11

STATUTES:

	Page
1938 Act as amended	1, 4, 5, 6, 11, 13, 14

CONSTITUTION:

	Page
Fifth Amendment	6
Sixth Amendment	6

IN THE

Supreme Court of the United States

No. 458.

GEORGE SYLVESTER VIERECK, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

On Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF.

PRELIMINARY STATEMENT.

Out of 19 questions in each of three supplemental registration forms, petitioner concededly answered correctly the 18 which were framed on the basis of specific requirements, or standards stated in the 1938 Act as amended. The only one of the 19 questions that the prosecution claims he did not correctly answer was Question 11 which was not based on any such standard stated in the statute.

As to the activities named in the indictment, which it is claimed that petitioner should have reported in answer to

this Question 11, he made no attempt to conceal that he loaned Flanders Hall, Inc., the sum of $22,500. Petitioner knew that the FBI had investigated the books of Flanders Hall early in January 1941 and again in March 1941 (Tr. 442-445, 456-458). As the Government has correctly stated, petitioner had been a witness before the committee that eventually reported the bill which became the Act of 1938, as amended. He was most careful to comply with what he thought were the requirements. There was ample opportunity for petitioner to have given in reply to paragraph 11 of the supplemental registration statement filed in April 1941 an answer different from the answers made in the two previous supplemental registration statements had he believed, or had he been advised by his attorneys that his previous answers were not complete answers to the said paragraph.

Petitioner has never denied that he assisted former Senator Lundeen in preparing at least three speeches which the Senator delivered and at least two of which were published in the Congressional Record. Petitioner has never denied that in one instance, only, he acted as the intermediary for his friend, Senator Lundeen, in assisting to make arrangements with Hill to mail out the speeches for Lundeen, and for which Lundeen paid Hill. There was nothing secret about such activities.

Petitioner has never admitted—and the prosecution did not charge in the indictment nor prove nor attempt to prove—that he was the agent of any foreign principal in connection with these activities or that he received a dime from any source whatever therefor.

Petitioner has never admitted—and we submit that the Government has not proved by any evidence worthy of credence—that he had anything whatever to do with the organization of any of the so-called War Debts Committees; or that petitioner had inserted in the Congressional Record any material, had any reprints made, paid for any reprints, or authorized or directed any one, including the

War Debts Committees to mail out any of such reprints under congressional frank or otherwise.

No attempt was made by the prosecution to show that petitioner requested, authorized or directed Hill and Dennett in having material inserted in the Congressional Record; in obtaining reprints thereof; in furnishing the money or any part thereof to pay for the reprints; or in mailing out the reprints.

The prosecution has relied upon the testimony of the two witnesses Webbers, husband and wife, employed by the War Debts Committees to address envelopes and mail out reprints, to establish the connection between petitioner and the War Debts Committees. This evidence is fully discussed in our main brief (pp. 24-25). We submit that such evidence was not the best evidence to establish any such connection; that the evidence is insufficient to establish such connection; and that even if petitioner had advised or assisted in establishing them, there is no evidence submitted to the jury which reasonably establishes that petitioner directed Hill and Dennett in their activity of obtaining and mailing out such reprints.

The petitioner has never admitted—and it was not charged in the indictment nor was there an attempt to establish by evidence—that petitioner received one dime of compensation from any foreign source whatever for his isolation activities or that he engaged in them for, or on behalf of any foreign principal. In fact, for all that appears, petitioner was an active isolationist because he believed in the advice of President Washington in his Farewell Address that the United States should remain out of Europe's quarrels and wars and because petitioner believed that the Neutrality Act should not be repealed. Further, that President Roosevelt should be upheld in his promise that American soldiers would not be sent to fight on foreign soil! In the absence of any reasonable showing to the contrary, petitioner is entitled to a presumption of good faith in such activities.

There being no reasonable evidence to the contrary, and the petitioner being entitled to the presumption that he was acting in his capacity as an American citizen as a non-interventionist, there remains but the legal question whether under Section 3 of the 1938 Act as amended by Section 2 of the 1939 Act and paragraph 11 of the supplemental registration forms the petitioner had to report these activities as the "nature of his business".

This being the legal question, why was it that the prosecution offered, and the trial court received in evidence against the petitioner so much prejudicial, incompetent, and immaterial evidence with respect to the charges contained in the indictment? And why was it that the prosecution made such attacks upon petitioner during the course of the trial, commencing with the opening statement to the jury and closing with the final arguments which we set forth, in part, in our brief in support of the application for certiorari (p. 54) and in our main brief (footnote, pp. 5-6; 10-28)?

Petitioner thinks the answer is simple. Unless the emotions of patriotism—one of the highest in the human breast—as well as the instinct for self-preservation could be aroused—classed by psychologists and sociologists as the most dominant instinct of man—there was scarcely any chance of convicting petitioner for failing to answer a paragraph 11 in three supplemental registration forms by giving a detailed statement of his activities when the words were not even used in the Question, though the entire English language was available for that purpose.

So successful were the prosecutors in the use of their appeals to the patriotic emotions and to the instincts of self-preservation of the jury of laymen that a verdict of conviction was not only obtained but it is also shown in the rulings on evidence, instructions given to the jury, and in the very heavy sentence imposed on the petitioner. The same arguments had their effect in the court below, *Viereck v. United States*, 130 Fed. (2nd) 945.

I.

There Is No Constitutional Power in the Congress for the Delegation in a Criminal Statute of Authority to an Administrative Officer to Fix a Standard, the Violation of Which Shall Constitute a Crime. The Standard Must Be Fixed in the Statute Itself.

This proposition may be accepted as a truism in the American system of government. See cases cited in our main brief (p. 42 note) and in our brief supporting the application for certiorari (pp. 31-32), including *United States* v. *George*, 228 U. S. 14; *United States* v. *Bathgate*, 220 U. S. 220; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Chase*, 135 U. S. 255; *Caha* v. *United States*, 152 U. S. 211.

The effect of these cases is that there are no constructive crimes, or crimes by intendment in the United States. The statute itself must fix the standard of conduct in clear and unmistakable terms, the violation of which standard constitutes a crime. We are now in a global war to preserve that system of government from Totalitarianism.

The petitioner is not charged in the indictment with failing to file either an initial or supplemental registration statements. He filed all of these statements within the periods of time prescribed.

The petitioner is not charged in the indictment with perjury in giving the wrong answers in his initial and supplemental registration statements.

It is a singular fact that the remaining 18 questions or paragraphs in each of the three supplemental registration forms, which the prosecution admits the petitioner properly and fully answered—certainly no crime with respect thereto has been charged in the indictment—are paragraphs or questions stated in the form by the Secretary of State in compliance with requirements or standards fixed by the Congress in the statute—Section 2 for the initial registration statements, and amended Section 3 for the supplemental registration statements. Petitioner literally complied with the specific requirements laid down

in the statute and grouped under the 19 separate paragraphs of the registration forms, except as to this paragraph 11 which he is charged with violating.

This paragraph 11 is based on the amended Section 3(c), the entire section being exclusively applicable to supplemental registration statements. This subsection 3(c) provides for:

> "(c) A statement containing such details required under this Act as the Secretary shall fix, of the activities of such person as agent of a foreign principal during such six months' period."

This subsection fixes nothing; prescribes no standard. It purports to confer on the Secretary of State authority in prescribing the forms, which must call for the specific facts provided for in subsections 3(a) and 3(b), to fix the "activities of such person as agent of a foreign principal during such six months' period" as the Secretary may want concerning the details required under the Act.

The failure of Congress to itself fix and name in the statute such activities which it wanted a registrant to name in his supplemental registration statement instead of attempting to confer that authority on the Secretary of State results in the said subsection 3(c) being unconstitutional under the Fifth and Sixth Amendments to the Constitution and decisions of this Court.

There is no escape from such conclusion for the very good reasons stated by Edward Livingston in the quotation from his Works found on page 45 of our main brief, namely to abolish the rule of constructive crimes, or crimes by intendment under vague and indefinite penal laws which made possible the infamous Lord Jeffreys and makes possible the Totalitarianism of Germany and Japan.

The failure of subsection 3(c) to itself fix or name the activities which the registrant should report had the very practical effect of resulting in the trial court's rulings on the admission of evidence and the instructions to the jury about which petitioner has complained.

II.

The Secretary of State Did Not Follow the Purported Requirement of Subsection 3(c) and Fix in Either Paragraph 11 of the Supplemental Registration Form or in Paragraph 12 of the Regulations the Activities of an Agent as Agent for a Foreign Principal Which Should Be Reported Concerning Details Required Under This Act.

The requirement in paragraph 11 of the registration forms to: "Give a comprehensive statement of nature of business of registrant"—and the indictment charges in each of the Counts II, III, and V a violation of this specific paragraph and none other by omitting to report certain activities—is not the fixing by the Secretary "of the activities of such person as agent of a foreign principal" to be reported in answer to said paragraph.

The word "activities" is not even mentioned in said paragraph. That word is not used elsewhere in the entire form except in subparagraph 13(b) where the registrant is required to furnish: "Dates of commencement of activity thereunder."—meaning under the contract of employment by the foreign principal. The Secretary knew the meaning of the word "activity" and how to use it when he wanted a report with respect thereto.

The conclusion is inescapable that the Secretary did not want "activities" in answer to this Question or else the Question is one for entrapment of even as good a scholar as petitioner. The latter conclusion is not in keeping with the high character of the Secretary of State.

The prosecution's argument comes to this: That "nature of business" is synonymous with "activities" and that when the paragraph asked for "nature of business" the petitioner should have replied with a detailed statement of his "activities."

We have shown in our main brief (pp. 59-61 and 7-8) the meaning of "business" and the distinction between "business" and "activity".

"Activity" or "Activities" may mean much or little. It certainly includes going to bed at night and arising in the morning, but is that to be reported under the Government's theory of the case? It certainly includes the exercise of the mental faculties and attention to the physical requirements of the body, but are these activities to be reported? And so on *ad infinitum*.

There being no requirements in the statute as amended as to the "activities" to be reported, and the word not being mentioned in paragraphs 11 of the supplemental registration forms; that is, no standard stated, what activities are to be reported and what are to be omitted? Most certainly neither the law nor forms nor regulations attempt to supply an answer to these questions.

Is it to be left to the prosecuting attorney in his drawing of the indictment; to the trial court in his rulings on tendered evidence and in his instructions to the jury and for the jury to determine what are material activities which a registrant is to report? If so, constructive crimes are upon us and we have Totalitarianism similar to that against which we are fighting.

While subsection 3(c) of the 1938 Act as amended purported to authorize the Secretary of State to "fix" the "activities, of such person as agent of a foreign principal" to be reported in the supplemental registration statements, the Secretary did not "fix" any activities to be reported, much less the activities of such person not for his foreign principal but for himself in his individual and personal capacity. The Secretary fixed for reporting: "Comprehensive statement of nature of business of registrant".

And even if the said subsection 3(c) were constitutional—in attempting to delegate to the Secretary the authority and power to fix a standard, the violation of which should constitute a crime—the Secretary did not comply with the authorization. Thus paragraphs 11 in the supplemental registration forms find no basis whatever in the said subsection 3(c) or elsewhere in the statute and is in excess of the power attempted to be delegated therein.

It is likewise a truism in American law—where Congress makes the law—that the exercise by an administrative officer of power in excess of that delegated to him is void and of no effect, even in civil matters and much more so in a criminal statute. See *United States* v. *Symonds*, 120 U. S. 49; *United States* v. *Garlinger*, 169 U. S. 316 and generally the cases cited in the first paragraph of the discussion of this point.

Notwithstanding that this paragraph 11 was in each of the three registration statements and notwithstanding that a registrant had to use the form under the specific requirements of this Section 3 of the Act, as amended, the Government attempts to argue here—as it did in the courts below—that paragraph 12 of the regulations issued by the Secretary required the registrant in answer to this Question 11 to report all of his activities, whether or not for a foreign principal and whether or not they constituted the "nature of his business". The three counts of the indictment were drawn, and the trial court's instructions to the jury were given on such theory.

Such an argument—as well as the indictment—must fall for the reasons stated on page 44 of our main brief and on pages 46-47 of our brief in support of the petition for certiorari. We insist that said paragraph 12 of the regulations simply required agents of foreign principals to register unless their activities were exempted from registration under the terms of Section 1 of the amended statute. What activities such an agent was to report were not fixed in subsection 3(c), nor in paragraph 11 of the supplemental registration forms, nor in paragraph 12 of the regulations.

If this paragraph 12 of the regulations must be interpreted as the courts below did interpret it and as the Government insists it should be interpreted—as requiring the agent to report all of his activities, whether or not for a foreign principal—then we submit that the said paragraph 12 likewise goes far beyond subsection 3(c) or any other section or subsection of the statute as amended. In that event the regulation is void and of no effect for reasons stated above.

In fact, any such claimed requirement of paragraph 12 of the regulations would have it make a crime of omitting to report activities—a requirement which both the Congress and the President realized that it required an entirely new statute to do, resulting in the passage by the Congress and the approval by the President of the New Act of April 29, 1942 containing Section 2 providing for the reporting of all activities, requiring some five printed pages in the appendix of our printed brief in support of certiorari to contain this Section 2 of the New Act while the amended subsection 3 of the 1938 Act required but a fraction of a printed page to contain it.

The Government is welcome to either horn of the dilemma.

The argument which the prosecution makes that not to interpret the statute as they insist it should be interpreted, is not an argument for a court. Such an argument is one for the Congress, the law-making body. Such an argument was undoubtedly made or understood when Congress formulated and passed the New Act of 1942.

III.

The Penal Section 5 of the 1938 Act Does Not Make a Crime of Any Failure, Whether Wilful or Otherwise, to Comply with the Regulations and Petitioner May Not Be Convicted for an Alleged Wilful Failure to Report His Activities on His Own Behalf, and Not for Any Foreign Principal in Answer to Paragraph 11 of the Supplemental Registration Forms.

Though they were brought to their attention, both of the courts below disregarded the decisions of this court that the failure to comply with an administrative rule, regulation, or form does not constitute a crime unless the statute specifically makes it so, these cases including, among others, *United States* v. *George*, 228 U. S. 14; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Standard Brewery*, 251 U. S. 210; *United States* v. *Grimaud*, 220 U. S. 506; and *Caha* v. *United States*, 152 U. S. 211.

See also *United States* v. *Dodson*, 268 Fed. 397; *United States* v. *Louisville & Nashville Railroad*, 166 Fed. 942; *United States* v. *Sandefuhr*, 143 Fed. 49; and *United States* v. *Butter*, 195 Fed. 657, quoting from 4 Blackstone's Commentaries, 5.

The age-old rule of law applied in these cases is to the effect that unless Congress in the statute makes a crime the violation of any rule or regulation issued by an administrative officer thereunder any indictment is invalid which charges a crime in the failure to comply with such rule or regulation. Any other conclusion would indeed make *"The Totalitarian State Against Man"* (McFadyean's translation of Couden-Hove-Kalergi, 1938) a reality here! In the case of *Caha* v. *United States, supra*, the Court quoted with approval from *United States* v. *Eaton, supra*, as follows:

> " 'It is necessary that a sufficient statutory authority should exist for declaring any act or omission a statutory offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited. Made in section 41 of the Act of October 1, 1890.
>
> " 'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense.' "

This penal section 5 of the 1938 Act is quoted on page 38 of our main brief and the entire amended statute is quoted in the appendix to our brief for certiorari (pp. 63-

66). This penal section does not make a crime of omitting to comply with a regulation, or even of omitting to comply in all respects with the forms. The penal section specifically provides that a crime under the Statute shall consist of:

> (1) Wilful failure to file any statement *required to be filed under the Act*—and petitioner filed all of forms he was required to file, including the three supplemental forms which are the subject of the remaining three counts of the indictment.
>
> (2) Or in complying with the *provisions of the Act*, makes a false statement of a material fact required to be stated therein—and petitioner was not charged, nor has it been claimed that he made any false statement in his registration forms, it being admitted by the prosecuting attorney that the answer "author and journalist" to paragraphs 11 was correct so far as it went.
>
> (3) Or in complying with the *provisions of the Act*, wilfully omits to state any material fact required to be stated therein.

The conviction and sentence must rest, if at all, upon No. 3. But petitioner was specifically indicted in each of the three remaining counts for wilfully omitting to state "as a part of his business and activities" in response to paragraphs 11 of the three supplemental registration forms, the certain isolationist activities named in the said counts. Petitioner was not indicted for wilfully omitting to comply with paragraph 12 of the regulations. Petitioner insists that the indictment did not state a crime punishable under Section 5 of the 1938 Act and that the Act nowhere therein made it a crime to omit to comply with the regulations and that it nowhere therein made a crime to omit to state "as a part of his business and activities" such activities as were charged in the indictment.

Both of the courts below have struggled to meet this issue.

The trial court thought that paragraph 12 of the regulations contained the requirement that petitioner report all of his activities and that it was unnecessary to find he

engaged therein for a foreign principal (Tr. 1456), saying that:

> "Well, there would be more force to what you have said, in my judgment, if I didn't have to look at Regulation 12." (Tr. 1484.)

The Court of Appeals was not content to rely upon Regulation 12 but proceeded to judicially rewrite subsection 3(c) of the Act so as to make it support the indictment (Pt. Main Br. 44-45). But even that rewrite did not support paragraph 11 of the registration forms.

The amended Section 3 of the Act relates exclusively—and inclusively—to the contents of supplemental registration statements. Subsections 3(a) and (b) lay down specific requirements and these specific requirements are both inclusive and exclusive so far as supplemental registration statements are concerned.

Subsection 3(c) is unconstitutional as being an attempted delegation of constitutional power to an administrative officer to fix what shall constitute a crime if there be a wilful failure to comply therewith. Neither the penal section of the Act nor any other section makes such a failure to comply with a regulation or form a crime; and, to cap it all, the Secretary fixed no activities to be reported in his paragraph 11 of the form. He asked for the nature of the business of the registrant, as in the preceding question 10 of the form he had asked for "Nature of business of foreign principal, or principals". (R. 45.)

In attempting to rely upon the general purposes of the Act to sustain the charge in the indictment, the Government not only, in effect, concedes that the indictment is defective in charging a wilful omission to comply with paragraph 11 of the registration forms, but it runs head-on into at least two rules of law.

First, an alleged crime may be within the letter of a criminal statute but not within the spirit thereof and in that event this Court will not uphold a conviction thereunder. *Church of the Holy Trinity* v. *United States*, 143 U. S. 226.

But the converse of this rule is not true that a crime may be within the spirit of a statute and not within the letter thereof. The Court will not uphold such a conviction. This Court has repeatedly declared that an alleged crime must have a clear legislative basis. *Fasulo* v. *United States*, 272 U. S. 620; *United States* v. *George, supra*, *Harrison* v. *Vose*, 9 Howard, 372, 378; *United States* v. *Wiltberger*, 5 Wheat. 76, 95.

Second, it is an universal rule of statutory interpretation that the specific terms of a statute control over any general terms thereof.

Last, but not least, the passage by Congress and the approval by the President of the New Act of April 29, 1942, wherein Section 2 not only combines the subject matter of Sections 2 and 3 of the 1938 Act as amended but this Section 2 of the New Act of 1942 includes much new matter. Not only did this New Act, in Section 2, specifically provide that a registrant must give the nature of his business and state his activities for both himself and for his foreign principal and prescribe what was material to be reported, but the said New Act, in Section 4, made what seems to be ample provisions for the control of propaganda (Pet. Br. Cer. 77-79).

In view of all this, it should be concluded that the indictment failed to charge a crime against the United States and that the demurrer should have been granted as to the entire indictment.

IV.

And the Proof Does Not Sustain the Indictment.

1.

Prejudicial, incompetent and immaterial evidence offered by the prosecution and admitted by the court.

The charges in the indictment were not sustained by the following prejudicial and incompetent and immaterial evidence offered by the prosecution and admitted by the trial court over objections of the petitioner, namely:

1. That Hitler and Goebbel's photographs were on the walls of petitioner's study in New York along with numerous other photographs. (R. 142-146.)

2. *Spreading Germs of Hate*, published by petitioner in book form in 1930 and published serially in a magazine before then, describing propaganda activities of the Governments of England, France, Germany, Ireland in the United States from 1914 to about 1919. (R. 123.)

3. That petitioner protested to the editor of *Liberty* magazine against an article printed therein concerning Hitler and his maid. (R. 151-53.)

4. That Senator Lundeen had arrangements with some of his employees whereby they paid over to him a part of their monthly salary which was placed in a fund to assist in paying the expenses of the office, and which transaction was characterized as kickbacks and extortion. (R. 304-305, Tr. 1566.)

5. Reading to the jury from time to time, of extracts from petitioner's book, *Spreading Germs of Hate* (Pet. Main Br. 11-16).

6. Whether Congressman Fish had read this book (R. 133-34).

7. That petitioner had given some money to girls employed at the Capitol with which to buy candy (Tr. 556).

8. Admission in evidence of a book, *One Hundred Families that rule the British Empire*, for which petitioner had filed in 1941 an initial registration statement (R-37-41), which registration was the subject of Count IV of the indictment (R-11-15) and which Count IV had been stricken out on demurrer (R-56). This book was admitted along with other books which petitioner had published and for which he did not register, it not being shown that they were published for any foreign principal (R-257).

9. That the petitioner, in peace times, and while the Neutrality Act was in effect, and while diplomatic relations were maintained with the German government, called upon the German Embassy in Washington for data to be used in speeches by Senator Lundeen (Tr. 723-725). There was no showing that petitioner was acting as the agent of the German Embassy but on the

contrary there was evidence that petitioner acted at the request or direction of Senator Lundeen (R-276-77).

10. Questioning Congressman Fish, a Government witness, by the prosecution as to whether he agreed with a statement in petitioner's book that patriotism was the last refuge of scoundrels (R-134).

11. That a box containing papers of one of the War Debts Committees was sent by Dennett to petitioner without his consent and that he protested (R-142-143).

12. That witness Hill and Dennett had been instrumental in having Senators and Congressmen insert much isolationist material in the Congressional Record and in purchasing many reprints therefrom which Dennett had mailed out in franked envelopes, there being no showing that petitioner authorized, directed, or requested that the material be inserted in the Congressional Record, or mailed out or that petitioner furnished any part of the money to pay the cost of doing so (R-290-301).

13. That former Supreme Court Judge Daniel F. Cohalan had addressed mixed Irish and German American audiences prior to 1917 and that he was the father of Daniel F. Cohalan, Jr., petitioner's associate trial counsel (R-129-131).

14. That mailstacks in large number were brought into the court-room before the jury at the secret request of the prosecuting attorney who then requested the court to permit two witnesses to identify the mailsacks, the request being denied and the court ordering the mailsacks taken from the courtroom (R-162).

15. That the British censor at Bermuda had intercepted and removed from United States mails an envelope mailed in New York City in July 1941, addressed to a person in Lisbon, Portugal, containing another envelope addressed to Dr. Dieckhoff in Berlin and clippings from the Congressional Record of speeches or extract from speeches made in the Senate, or inserted, by Senator Rush Holt (R-206-209).

16. That the FBI witness, with the aid of large charts, believed the envelopes intercepted by the British censor at Bermuda were addressed by the same type-

writer used in writing a letter signed by the petitioner (Tr. 1037).

17. That petitioner had advised the editor of Liberty in November 1937 that Congressman Fish was willing to collaborate in writing an article urging a referendum before the United States declared war (Tr. 1346-1349).

The prosecuting attorney referred to this memorandum in his closing address that Congressman Fish saw eye to eye with petitioner, "this Nazi propagandist on the question of war referendum back in 1937. The measure that would have hamstrung us" (Tr. 1567).

Petitioner believes that all of this evidence, offered by the Government and admitted by the trial court, was highly prejudicial, immaterial, and incompetent; that it had absolutely nothing to do with the charge in the indictment that he had wilfully omitted to name the activities charged in the indictment in his answer to paragraph 11 of the three supplemental registration forms; and that the admission of such evidence constitutes reversible error. This shows the kind of abundant proof of petitioner's guilt to which the prosecution refers and the conduct of the trial for which it is responsible!

2.

Statements of the prosecuting attorneys which did not explain any proof of the charges.

These statements, culled from the proceedings, are as follows:

1. That the petitioner had been described in his book, *Spreading Germs of Hate*, as "A venom bloated toad of treason" and that the prosecutor did not care to add a single word to that description (Tr. 1588).

2. That petitioner engaged in "nefarious" activities in his home in New York City (R. 157).

3. That petitioner was a "self-proclaimed master of the insidious art of propaganda" (R-155).

4. That petitioner was the world's greatest propagandist (Tr. 1557).

5. That petitioner was being tried for propagandizing (R-154).

6. That petitioner was a little proponent of better relations between the United States and Germany, the petitioner being of small statute (R-159).

7. That petitioner was serving his "Teutonic overlords in Berlin" (Tr.).

8. That petitioner was trying to divide us and literally beat our brains out (R-159).

9. That petitioner had a long and dishonorable career (Tr. 1558).

10. That petitioner's book, *Spreading Germs of Hate* was the text of the Government and the epitaph of the defendant (Tr. 1553).

11. That petitioner's contracts with the Munich newspaper and the German Library of Information were "window dressing, fake window dressing; camouflage; the stock in trade of every propagandist" (Tr. 1558).

12. That petitioner was the agent of the Nazi party organ, the Munich newspaper (Tr. 1558) when there was absolutely no evidence before the jury to that effect.

13. That petitioner wrote that "pious clap-trap" to the representative of the German Library of information that in event of severance of relations between the United States and Germany the petitioner would not continue the contract (Tr. 1554).

14. That the court should inquire of a prospective juror who had admitted prejudice against the petitioner whether that juror could lay aside his feelings that petitioner had been "unpatriotic" and give him a fair trial (Tr. 57). The State Department had issued a press release to the effect that it was not unpatriotic for an American citizen to register as the agent of a foreign principle (Tr. 1324).

15. That petitioner was one of the three masterminds of German propaganda in the last war (R-157), which is contrary to the Government's own evidence. (Spreading Germs of Hate, p. 167) where it is stated that petitioner engaged in selling Liberty bonds, etc., after the United States entered the War for which he was commended.

16. That petitioner had "shamed and defiled his American citizenship" (Tr. 1501).

17. That petitioner was the "American apostle of the murderous lying rogues in the Wilhelmstrasse" (Tr. 1559).

18. That petitioner was "this Nazi disciple" (Tr. 1559).

19. That petitioner had "devilish cunning and daring" to put "Hitler's words into the mouth of a United States Senator" (Tr. 1564).

20. That petitioner's late friend, Senator Lundeen, was "Possibly more fool than rogue. Certainly something of both. Certain it is that those girls kicked back part of their salary to him. He called it a reserve fund. • • • Others have a shorter and uglier term for the same practice. It has been called 'extortion' (Tr. 1565-66).

21. That we "come to the Fish in question. That windy warrior who cowered in his tent while this poor unfortunate clerk took the rap for shielding him • • • that Fish of foul memory" (Tr. 1566).

22. That the opening statement of petitioner's chief trial attorney to the jury "sounds like the Gettysburg address to me, your honor" (Tr. 213).

The Government argues in its brief that many of the remarks of the prosecutor "may have been provoked in some measure by defense counsel's attempt to turn the case into a trial of the Government and his comparison of the pr e-cution with a Communist, Fascist or Nazi persecutio (P. 50). The Court is urged to read the record. It is believed that the suggestion is absolutely unfounded and that de-

fendant's counsel studiously avoided any such conduct as would give this prosecutor the excuse that he had in the cases cited in the last paragraph of the footnote on pages 54 and 55 of our main brief. After more than a week of such charges and conduct as above cited, no argument of defendant's associate counsel—as quoted on pages 50 and 51 of the Government's brief—could remove the prejudice of the jury and trial court done the petitioner by such remarks and charges of the prosecutors.

There was no word of condemnation by this prosecutor of interventionist in or out of Congress. His attacks were directed at some isolationists in Congress and in proof the Court's attention is invited to the quotations from the record at pages 14 to 20 of our Main Brief.

This is far from justice which an imaginary speaker is made to state at a banquet celebrating the centenary of 1789, as contained in an introductory essay by M. De Laveleye to *The Origin of Republican Form of Government in the United States of America* by Oscar S. Straus (1926, Putman's, pp. xxxviii to xxxix) as follows:

> "'The whole year 1789 contains a germ of Hebraism. The idea of right and social justice is an Israelitish idea. The advent of justice on this earth has been the dream of our people. To find the first source of man's rights, we must go back farther than the Reform or the Renaissance, farther back even than antiquity or the Gospel, as far back as the Bible, The Thora, and the prophets. Our rabbis, the Isaiahs and Jeremiahs, were the first revolutionists. They announced that the hills should be leveled, the valleys filled up. All modern revolutions have been the echo of that voice which reverberated in Ephriam. We were still herded in the ghetto, on our shoulders was still bound a yellow cord of infamy, when Christianity sought in our sacred writings the startling principles of its revolutions. From our Bible came the Reformation. From it came the inspirations of the poor wretches of the low countries. Puritans in England and America appropriated the language of our judges and prophets."

It is for the preservation of these principles, declared in 1776 and written into our Constitution in 1789 and its first ten Amendments, that Americans are today serving shoulder to shoulder with the descendants of men we had to defeat in order to secure these principles. Among these millions of marching Americans is a native born American, son of this petitioner (Tr. 162, 3)—this adopted American who tried to preserve peace between the land of his birth and the land of his adoption until he cancelled his agency contracts long before the Declaration of War on December 8, 1941 (R. 52-53, 90) and long before his indictment on October 8, 1941.

It seems clear that petitioner subscribes, in substance to these statements in Straus' book. (See page 73 of our Main Brief.)

3.

Compensation received by petitioner.

The prosecution attempts to make much of the fact that for approximately 18 months the petitioner received approximately $65,000 from his three foreign principals.

This sum included the $10,000 for publication of the book, One Hundred Families, etc. It also included very considerable sums which petitioner had to pay to his workers and assistants in gathering data, the exact amount not being shown though the Government had available these records in the Bureau of Internal Revenue.

In considering the balance it is not to be overlooked—as petitioner pointed out in his letter to the German Library of Information—that he was unable to write books and magazine articles during this period. This was a very important matter. If petitioner's material remained out of magazines and he published no books for any considerable length of time, his reading public would largely forget him and there would not be the demand for his work which enabled him to command large prices therefor. Such failure of a writer to write for his reading public is even worse than the failure of a lawyer to practice.

Last, but not least, the Nazi cause was an unpopular cause in the United States. Service for the Nazis would bring down on petitioner the ill will of many, even possible prosecution by his Government. Looking back over what has happened, the petitioner was underpaid instead of receiving so much—as the Government seems to believe—that he could use a considerable part to finance propaganda.

4.

Registration statements in evidence.

The Government introduced in evidence at the commencement of the trial certified photostatic copies of the registration statements and their attached contracts. They were admitted under the seal of the Department of State. No witness was called by the Government for that purpose nor was there any attempt made by the Government to explain their contents. Even the trial court did not know the contents of the papers thus placed before the jury (R-259-260). After the Government had rested its case and during the course of the petitioner's case, counsel for petitioner read from the registration statements and contracts to the jury but the harm had then been done (Tr. 1282-1305).

CONCLUSION.

The case should be reversed with directions to dismiss the indictment.

Respectfully submitted,

O. R. McGuire,
Attorney for Petitioner.

January 29, 1943.